1988

First Security Bank of Utah v. Chas. E. Bryan : Brief of Appellant

Utah Court of Appeals

Chas. E. Byran, Paul D. Graff; pro se.
Norman T. Stephens; pro se.

IN THE UTAH COURT OF APPEALS

FIRST SECURITY BANK OF UTAH)
)
vs.)
)
CHAS. E. BRYAN) CASE NO. 380628
)
et. al.,)

APPELLANTS BRIEF

Appeal from an order of Summary
Judgement of the 5th. District
Court of Iron County.
The Honorable Dean Condors, Presiding

Chas. E. Byran
5325 Boulder Hwy. #178
Las Vegas, NV. 89121

Norman T. Stephens
5325 Boulder Hwy. #178
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Paul D. Graff
Cedar City, UT. 84720

pro se

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STATEMENT OF ISSUES

The issues presented by these appeals are as follows.

I

The trial court abused its discretion in granting summary judgement.

II

Respondent is not entitled to summary judgement in light of the issues raised by appellants.

III

Appellant filed sworn to documents and memorandums in opposition to respondent motions thereby raising genuine issues of material facts.

JURISDICTION

The Utah Court of Appeals has jurisdiction to decide this Appeal pursuant to Rule 3 (a) of the Rules of the Utah Court of Appeals and Utah Code Annotated Section 78-a-3 (2) (j).

NATURE OF PROCEEDINGS

These Appeals are from Summary Judgments entered by the Fifth Judicial District Court in and for Iron County, State of Utah, in consolidated cases numbered 9299, 9478, 9934, 9489, 10040, 10141, 10597, and 10782, dismissing Appellants claims against Respondent, First Security Bank of Utah, N.A.

The Summary Judgments from which this appeal is taken were rendered on July 4, 1988, and entered by the Court on July 8, 1988. There were no Motions filed pursuant to Rules 50 (a) or (b), 52 (b) of the Utah Rules of Civil Procedure. A Motion under Rule 59 was filed and denied. The Notices of Appeal were filed on or about August 8, 1988.

STATEMENT OF THE CASE

These appellants are appealing orders of Summary Judgment from the Fifth District Court dismissing most of appellants' affirmative claims. At times throughout the pleadings, appellants are referred to as claimants. Also, on occassion, First Security Bank is referred to as FSB and Auto West, Inc., is referred to as AW.

SUMMARY OF ARGUMENTS

I

The trial court abused its discretion in granting summary judgment.

Rule 56 (c) URCP allows summary judgment only if the sworn documents eleminate all genuine issues of material fact. The Trial Court failed to consider all of the pleadings and all of the depositions. Therefore, the orders of summary judgment were inappropriate.

II

Respondent is not entitled to summary judgment in light of the issues raised by appellants.

One of the underlying principles of the Agthangelides (infra) case is that summary judgment should not be granted when a properly pled claim or defense, if proven at trial, will defeat plaintiff's claim, Eventhough appellants do not rest on their pleadings, summary judgment should not be allowed because of the claims and defenses pled by claimants, i.e., lack of consideration, lack of good faith dealings and fraud.

III

Appellant filed sworn to documents and memorandums in opposition to respondent motions thereby raising genuine issues of material facts.

The supporting affidavits filed by plaintiff failed to meet the criteria of rule 56 (e) URCP and therefore, it was error for the trial court to consider the same. Further, the appellants filed numerous sworn to documents which raise genuine issues of material fact.

STATEMENT OF FACTS

The three (3) individual appellants, Paul D. Graf, Norman T. Stephens and Chas. E. Bryan are respectively the President, Vice President and Secretary of the Utah Land and Cattle Company, Inc., Three Peaks Water Company, Real West, Inc., Auto West, Inc., and Jones Motor Company Inc., Utah Corporations. They are also stockholders in all the above named corporations. (Depo., Chas. E. Bryan, civil #9299, taken 1&2 July, 1982 pp. 4-8).

First Security Bank is a National Banking Corporation doing business in Cedar City, Utah. On or about March 27, 1979, in Cedar City, Utah, (complaint, civil #9299, p.1., ll 1-3) the appellants and respondent, through their officers, negotiated a loan, the terms of which are as follows: (Depo., Chas. E. Bryan, civil #s 9299 & 10597, taken April 29 & 30, 1986, p. 195, l. 16 thru p. 199, l. 10)

(a) First Security Bank agreed to loan Appellants $300,000.00.

(b) First Security Bank agreed to issue said &300,000.00 to Auto West, Inc., upon request or on or before December 31, 1979.

(c) First Securtiy Bank and appellants agreed that the interest rate upon said loan would be 14% per annum.

(d) First Security Bank and appellants agreed that the term of said loan would be 15 years.

(e) Appellants agreed to grant First Security Bank, as security for said loan, a second trust deed on the real property belonging to Jones Motor Company and all furniture fixtures and equipment not otherwise encumbered.

During December of 1979, appellants requested First Security Bank to issue said loan and proceeds, and First

Security Bank failed to issue the loan or distribute the proceeds therefrom. During January of 1980, appellants requested the First Security Bank to issue said loan and proceeds, and Defendant failed to do so. (Depo., Chas. E. Bryan, civil #s 9299 & 10597, taken April 29 & 30, 1986, p. 197, l. 16 thru p. 198, l. 2).

Most of the proceeds received by Auto West, Inc., Real West, Inc., Utah Land and Cattle Co., Norman Stephens, Chas E. Bryan and Paul D. Graff, as a result of the short term loans referred to herein, were in turn funnelled by said individuals and entities, with the suggestion, knowledge and approval of officers of First Security Bank to Auto West, Inc. (Depo., Norman T. Stephens, civil #9299 and consolidated cases, taken December 1, 1986, p. 118, line 15 thru p. 119, l. 22).

During February of 1980, officers of First Security Bank reaffirmed First Security Bank's commitment to loan appellants $300,000.00 on the same terms as stated above. Further appellants agreed to increase the principle amount of said loan sufficient to pay the interest on short term loans previously granted to Auto West, Inc., Real West, Inc., Utah Land and Cattle Co., Norman Stephens, Chas. E. Bryan and Paul D. Graff.

Appellants relied upon the loan commitments of the Bank and in reliance thereon, appellants incurred debts. (Depo., Chas. E. Bryan, civil #s 10782 & 7528, April 16 and 17, pp. 199 l. 6 thru p. 200, l. 5 and Depo. Chas. E. Bryan, civil # 9478, pp. 16, ll. 5 thru p. 2, March 30. In September of 1980, an officer of First Security Bank requested Auto West, Inc., Real West, Inc., Utah Land and Cattle Co., Norman Stephens, Chas. E. Bryan and Paul D. Graf to bring the interest payment on all of their loans current as a condition for loaning Auto West, Inc., said $300,000.00. Said officer of First Security Bank assured

appellants, that the $300,000.00 loan would be made as soon as said parties paid the interest current on their loans. Said parties complied and paid the interest current on all of their loans from First Security Bank. First Security Bank failed to make said loan. (See complaint in civil #10597, and Depo. June 12 & 13, 1987, pp. 31, ll. 19 thru p. 32, l.l.).

On or about October 1, 1980, First Security Bank reconfirmed its commitment to loan appellants $300,000.00 plus interest accured upon the short term loans, First Security Bank had make to Real West, Inc., Utah Land and Cattle Co., Norman Stephens, Chas. E. Bryan and Paul D. Graff, and that loan would be make during October of 1980. First Security Bank failed to make said loan to Auto West, Inc..(See complaint and Depo., supra.) Those terms were modified in April of 1981. (Depo. Chas. E. Bryan, civil #9299, pp. 198, ll. 9 thru p. 202, l. 5).

Auto West, Inc., acquired all of the Jones Motor Company stock in December of 1979. (Depo., Chas. E. Bryan, civil #s 10782 & 7528, 16 & 17 April, 1986, pp. 94 l. 19 thru p. 98, l. 16).

During February of 1981, First Security Bank, through its officers, renewed its commitment to loan Auto West, Inc., $300,000.00 plus an additional sum of $22,000.00 (an interest payment previously paid to First Security Bank by Real West, Inc.) and additional monies sufficient to pay current the interest on loans make by First Security Bank to Real West, Inc., Utah Land and Cattle Co., Norman Stephens, Chas. E. Bryan and Paul D. Graff. It was agreed by First Security Bank and Auto West that said loan would be secured as set forth above. First Security Bank agreed to make said loan in thirty (30) days. First Security Bank failed to do so. (See complaint and Depo., supra).

Appellants relied upon said loan commitment of First Security Bank and made expenditures in anticipation therof. (Depo., Cas. E. Bryan, civil #s 10782 & 7528, April 16 & 17 1986, pp. 41, l. 25.).

On or about April, 1981, an officer of First Security Bank presented the Secretary/Treasurer of Auto West, Inc., with a document titled: "Schedule A - Purpose of Loan Proceeds" which did not provide Auto West, Inc., with the $300,000.00 previously committed by First Security Bank.

During June of 1981, appellants and officers of First Security Bank met, where officers of First Security Bank advised appelants that First Security Bank was prepared to make a loan of $500,000.00, but most of the proceeds were to go to First Security Bank. First Security Bank officers also demanded, as security for said loan, all assets previously pledged to First Security Bank by all the appellants and all remaining assets of appellants. This offer and demand, was contrary to any previous loan commitment of First Security Bank. (See three citations immediately above).

From August 1978 through February 1982, Appellants and First Security Bank had contracted, one with the other, in a floor plan financing agreement, to wit: First Security Bank provided the financing for appellants' automobile inventory and purchased appellants customer installment sales contracts, either on 90 day or full recourse. (Depo., Chas. E. Bryan, supra, pp. 31). Each time First Security Bank purchased a trust receipt for newly acquired inventory from appellants, a fixed interest rate was established at the current prime rate plus 3/4 of a percent. However, as interest rates moved up, First Security Bank charged and collected an increased interest rate from appellants. (Depo., Chas. E. Bryan, civil #s 9299 & 10597).

First Security Bank also charged to and collected interest from appellants that was not earned or due. (Depo., Chas. E. Bryan, supra, pp. 150, l. 5 thru p. 152, l. 22).

On or about August 24, 1981, Auto West, Inc. and Jones Motor Company jointly filed for Chapter 11 bankruptcy with the U.S. District Court for Utah. (p.2, memorandum decision and order, United States District Court of Utah, Dated October 14, 1984, attached to claimants' second memorandum in opposition to First Security's motion for summary judgment, dated April 1, 1988).

After Auto West, Inc. and Jones Motor Company filed for Chapter 11 bankruptcy, First Security Bank, through its agents, repossessed automobiles sold by Auto West, Inc., failed to offer said vehicles to Auto West, Inc., sold said vehicles and charged Auto West, Inc. with deficiencies, all of which is contrary to the recourse agreements between these parties and said actions by First Security Bank constitute lack of good faith and breach of said recourse agreements. (Depo., Chas. E. Bryan, supra, pp. 167, l. 24 thru p. 172, l. 9).

Prior to September 1, 1981, First Security Bank conducted periodic, on premises, audits of the inventory of Auto West, Inc. Said audits were infrequent and never more than once monthly. Commencing on or about September 1, 1981, and continuing through February 1982, First Security Bank conducted daily or twice daily, on premises, audits of Auto West's inventory. (Depo., Chas. E. Bryan, Supra, pp. 182, l. 6 thru p. 18).

Based upon the aforedescribed discussion and agreement between the parties on March 30, 1979, Utah Land and Cattle Company, Inc., by and through Paul D. Graff and Chas. E. Bryan, executed and delivered to First Security Bank a Trust Deed Note (Second Trust Deed Note) in the

original principal amount of $127,000.00. On the same day, and to secure the performance of the obligations set forth in the Second ULC Note, Utah Land and Cattle, as trustor, executed and delivered to First Security, as beneficiary, a Trust Deed with Assignment of Rents. The Trust Deed Describes real property located immediately east of Cedar City in Iron County, Utah. (Depo., Chas. E. Bryan, civil #9299, August 26, 1983, p. 77, ll. 5-12).

On March 30, 1981, Utah Land and Cattle, Three Peaks, Paul D. Graff, Chas. E. Bryan, and Norman Stephens, pursuant to the aforesaid discussions and agreements between the parties, executed and delivered to First Security a Trust Deed Note in the original principal amount of $22,000.00 (the Third ULC Note). On the same day, and to secure the performance of the obligations set forth in the Third ULC Note, Utah Land and Cattle, as trustor, executed and delivered to First Security, as beneficiary, a Trust Deed with Assignment of Rents. The Trust Deed describes the same real property as described in the Trust Deed securing the First ULC Note. (Depo., Chas. E. Bryan, supra, p. 77 ll. 17-20). To secure the performance of the obligations set forth in the Third ULC Note, Three Peaks as trustor executed and delivered to First Security, as beneficiary, a Trust Deed with Assignment of Rents. (Depo., Chas. E. Bryan, supra, p. 77, ll. 21-22).

On October 2, 1981, First Security Bank instituted its action for the judicial foreclosure of the Deeds of Trust described above, as well as Deed of Trust from Utah Land and Cattle Company and a Deed of Trust from Three Peaks Water Company, both of which describe water rights and bear the date of August 21, 1978. (See Complaint).

On February 8, 1982, the Appellants Utah Land and

Cattle and Three Peaks filed their Counterclaim against First Security.

Based upon assurances from officers of First Security Bank that the debt evidenced by Trust Deed dated February 21, 1980, would be paid and retired form the proceeds of long-term financing by the bank to Auto West, Inc., Norman T. Stephens granted a second Trust Deed on his home and Trust Deed Note (principle sum of $28,000.00), to First Security Bank. (Depo., Norman T. Stephens, civil #9299 and conslated cases, p. 159 thru p. 161, l. 2 taken December 1, 1986.) No payments were made on the note.

On the 27th day of October, 1982, Security Title Company of Southern Utah, as trustee, recorded a NOTICE OF DEFAULT with the Iron County Recorder's Office pertaining to said 2nd Trust Deed. (See Exhibits attached to Complaint).

On or about August 10, 1979, Mr. Bryan at the suggestion of officers of First Security Bank, (see second following refferal), executed and delivered to First Security a Trust Deed Note (Note) in the original principal sum of $15,000.00. (Depo., Exhibit #1, Chas. E. Bryan, civil # 9429 Taken April 30, 1981). Prior thereto, officers of the bank represented to Chas. E. Bryan that payment of the note was to come from the proceeds of the promised long term financing to Auto West. (Depo., Chas. E. Bryan, civil # 9478).

Also on or about August 10, 1979, Mr. Chas. E. Bryan, as trustor, executed and delivered to First Security, as beneficiary, a Trust Deed with Assignment of Rents ("Trust Deed"). (Depo., Exhibit #3, Chas. E. Bryan, civil # 9478, Taken March 30, 1988). The Trust Deed created a second lien interest in favor of First Security on certain undeveloped real property of Mr. Bryan, which was located in Iron County, Utah.

At the time of the Note and Trust Deed, First Security Bank had a September 1, 1977 appraisal which had been previously prepared on the property by Ken Esplin. According to that 1977 appraisal, the property had a then fair market value of $79,000.00. (Depo., Exhibit #4, Chas. E. Bryan, civil # 9478, taken March 30, 1987).

On or about October 6, 1980, First Security Bank and Mr. Bryan signed a Modification Agreement which extended the maturity date of the Note to August 1, 1981. (Depo., Exhibit #4, supra).

After the Note, as extended, had matured, First Security Bank requested the trustee of the Trust Deed to commence non-judicial foreclosure proceedings. Shortly before the scheduled foreclosure sale, First Security Bank requested and obtained a new appraisal from Lyman Munford on the property described in the Trust Deed. In his appraisal Mr. Munford concluded that the fair market value of the subject property as of year-end was $42,500.00. (Depo., Chas. E. Bryan, civil #9478, pp. 70, ll 12 thru p. 79).

A non-judicial foreclosure of the Trust Deed occurred on January 12, 1982. First Security Bank was the high bidder at the sale and acquired a trustee's deed to that property as a result of the foreclosure sale. (See Exhibit attached to Complaint). Although the Trust Deed was the second lien on the property that Trust Deed was the only First Security Bank lien which was foreclosed at the 1982 trustee's sale. With the exception of First Security, any other bidder who might have appeared at the sale would have purchased the subject property subject to First Security Bank's earlier 1977 trust deed. (See two citations immediately above). First Security Bank bid in the sum of $16,695.20 at the foreclosure sale. (Depo., Chas. E. Bryan civil, #9478, March 30, 1987 pp. 78 l. 22 thru p. 79 l. 7).

ARGUMENT
POINT I

THE TRIAL COURT ABUSED ITS DISCRETION IN GRNATING RESPONDENT'S MOTIONS FOR SUMMARY JUDGMENT.

Rule 56(c) of the Utah Rules of Civil Procedure provides, in part, as follows:

> The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Emphasis added)

In the first paragraph of the Court's MEMORANDUM DECISION he states;

> This court has tried to read carefully all of the memorandums filed together with most of the pleadings and some of the depositions. (Emphasis added)

By the Court's own admission he did not read all of the pleadings and depositions. Without reading all of the pleadings and depositions the Court could not possibly find, as he did, that no genuine issue of material fact existed nor did the Court have a basis for finding that the respondent was entitled to judgment as a matter of law.

In the case of Reliable Furniture Company vs. Fidelity, 16 Utah 2nd 211, 398 p. 2d 685 (Utah 1965), where the Court, (without a motion), at pretrial dismissed plaintiff's complaint, the Utah Supreme Court, in a four to one decision, reversed the trial court saying:

> The summary disposal of a case serves a salutary purpose in avoiding the time, trouble and expense of a trial when it is justified. But unless it is

> clearly so, there are other evils to be guarded against. A party with a legitimate cause, but who is unable to afford an appeal, may be turned away without his day in court; or, when an appeal is taken, if a reversal results and a trial is ordered, the time, trouble and expense is increased rather than diminished. It is to avoid these evils and to safeguard the right of access to the courts for the endorcement of rights and the remedy of wrongs by a trial, and by a jury if desired, that it is of such importance that the court should take care to see that the party adversely affected has a fair opportunity to present his contentions against precipitate action which will deprive him of the privilege. His contentions as to the facts should be considered in the light most favorable to him, and only if it clearly appears that he could not establish a right to recovery under the law should such action be taken; and any doubts which exist should be resolved in favor of affording him the privilage of a trial. (Emphasis added).

A careful reading of the Trial Court's MEMORANDUM DECISION reveals that the Court weighed disputed evidence which resulted in a favorable ruling for respondents. In W.M. Barnes Co. vs. Sohio 627 p. 2d 56,59 (Utah Supreme Court, 1981, the Supreme Court held that on a motion for summary judgment, it is not appropriate for a court to weigh disputed evidence and the sole inquiry to be determined is whether there is a material issue of fact.

These cases involve numerous interelated issues, most being or having some dependence upon other issues and as a result a piecemeal dismissal of many of appellants' issues will deprive the appellants of the opportunity both to present the entire case and demonstrate how the different aspects of each relate to one another and are dependent upon other issues.

In these cases the Court failed to read all of the pleadings. Thus appellants' "contentions as to the facts", apparently were not considered. As a result the Court ruled in a vacuum and clearly erred in granting respondent's

motions for summary judgment.

POINT II

RESPONDENT IS NOT ENTITLED TO SUMMARY JUDGMENT IN LIGHT OF THE ISSUES RAISED BY APPELLANTS.

While appellants are aware of the numerous cases which hold that a party against whom summary judgment is sought cannot rest upon its pleadings, there are some cases where summary judgment simply is not appropriate. In Agathangelides vs. Shaw, 740 p. 2d 259, (Utah 1987), the Utah Supreme Court, unanimously held, in a case where plaintiff sued defendants on a promissory note and defendants answered, raising failure of consideration as an affirmative defense, that summary judgment was not appropriate. In so holding the Court, at page 261 stated:

> We do not understand how Plaintiff's could be intitled to judgment on a note as a matter of law if factual issues to warrant trial existed as to whether there was consideration.

In the instant cases not only did appellants affirmatively raise the defense of lack of consideration and payment, but they pled counterclaims based in fraud, lack of good faith dealings and breach of contract. Any of these theories if established at trial, will defeat respondents claim to foreclose or for deficiency judgments against appellants.

The Trial Court erred in dissmissing appellants' complaints and counterclaims. It goes without saying that matters pled in a counterclaim are in fact to be considered as defenses by the Court. Rule 8 (c), Utah Rules of Civil Procedure.

It appears that one of the underlying principles of the Agathangelides (Supra) opinion is that summary judgment should not be granted when a properly pled claim or defense, if proven at trial, will defeat Plaintiff's claim. To rule otherwise could result in manifest injustice. In these cases, the ruling of the Trial Court on Respondent's motion for Summary judgment will likely result in appellants being denied their basic defenses at trial.

Therefore in keeping with the Agathangelides (Supra) ratonale it was inappropriate for the trial court to grant summary judgment in these cases.

POINT III

APPELLANTS FILED ABSTRACTS OF DEPOSITIONS, AFFIDAVITS, MOTION TO STRIKE AFFIDAVITS, AND MEMORANDUMS IN OPPOSITION TO RESPONDENT'S MOTIONS FOR SUMMARY JUDGMENT. THEREBY ESTABLISHING GENUINE ISSUES AS TO MATERIAL FACTS.

Appellants filed numerous abstracts of depositions, affidavits and memorandums as well as a motion to strike affidavits. Further, all parties relied upon all of the depositions taken in these cases. All of these documents were filed in opposition to respondents' motions for summary judgment and one is compelled to ask, are these some of the pleadings that the Trial Court failed to read?

The affidavits filed by respondent in support of its motions for summary judgment fail to meet the requirements of rule 56 (e) of the Utah Rules of Civil Procedure, provides (in the relevant part) as follows:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

The rule sets forth three requirements for such affidavits.

They are:

1. The affidavits shall be made upon affiant's personal knowledge.

2. The affidavits shall set forth facts as would be admissible in evidence.

3. The affidavits shall show affirmatively that the affiant is competent to testify to the matters stated therein.

The affiant, Norman I. Heaton, fails to state in his affidavit that he makes the affidavit upon his personal knowledge. Further, there is no showing in the affidavit stated.

As to the second criteria of rule 56(e) there are no foundational facts set forth in the affidavit thd therefore the facts set forth in the affidavit may or may not be admissible in evidence.

AFFIDAVIT OF PAUL WADE CARTER AND LONETA SUE CARTER:

Said affidavit suffers from the same shortcomings as the Norman I. Heaton affidavit and therefore the same argument is applied.

AFFIDAVIT OF STEPHEN R. BROWN:

Said affidavit fails to meet the first and third criteria of rule 56(e) and may also lack foundation and therefore must fail.

AFFIDAVITS OF DAN A. ROBISON dated November 2, 1987 and November 3, 1987.

Neither of the Robison affidavits state any basis whatsoever that would enable the reader to ascertain Dan A. Robison's connections, if any, to the trustee, Security Title Company of Southern Utah. Further, his affidavits fail to state that he is familiar with the books and records of the trustee. Therefore, there is nothing in the affidavits to show that (1) the affidavits are made upon affiant's personal knowledge, (2) that the facts set forth would be admissible in evidence, nor, (3) is there any showing that affiant is competent to testify to the matters stated therein.

AFFIDAVIT OF C. DANIEL COVINGTON dated October 5, 1987:

Nowhere in C. Daniel Covington's Affidavit does he state that he makes the Affidavit on his <u>personal knowledge,</u>

except in paragraph 49.

In fact, affiant repeatedly states "...it appears ..." (paragraphs 4, 6, 9, 12, 14, 30, 31, and 32)

Inadmissible hearsay appears in the following paragraphs of the Covington Affidavit: 4,6,9,12,14,18,23,25, 26, 30, 31,32,38,40, and 50.

Paragraphs 11,13,16, and 35 of the affidavit contain inadmissible conclusions.

Statements appear in paragraphs 27 and 35 of the affidavit that lack sufficient foundation to be admissible. Paragraphs 42,43, and 41 contain assumptions that would be inadmissible at trial.

However, paragraphs 47 and 49 of the Covington Affidavit bear particular and special scrutiny. The draftmanship of said paragraphs is remarkable for its evasion. To illustrate the skill with which those paragraphs were drawn, they are set out in their entirety as follows:

> 47. Various extension agreements dated on or about October 6, 1980, (Exhibits "H" through "K" do not reflect any contract or commitment by either First Security or Auto West regarding a takeout loan to be made by First Security to Auto West. Exhibits "H" through "K" were intended to and did merely extend already existing obligations owed to First Security. The contents of those documents reflect the agreements between First Security and its borrowers with respect to those extension agreements. (emphasis added).
>
> 49. From documents reviewed and from his own personal knowledge, affiant is aware that First Security did make various loans, some of which had terms of five years or longer to Utah Land and Cattle, Jones Motor Company and Real West, Inc. Each one of those loans was a separate, independent loan transaction and was supported by its own collateral, payment schedule and loan history. The loan application summaries describe the anticipated repayment source of the loans. Affiant is unaware of any other payment source of those loans beyond the sources of payment appearing on the various applications. Where those applications do not reflect a purported long term loan to Auto West as a source of repayment, affiant is unaware of

> information that would indicate that a long term loan to Auto West was regarded by First Security a repayment source or that any officer or employee of First Security committed First Security to long term Financing for Auto West. (emphasis added)

Paragraph 47 attempts to limit affiant's knowledge to exhibits "H" through "K" and allow him to honestly say: "... (Exhibits "H" through "K") do not reflect any contract or commitment by either First Security or Auto West regarding a take out loan... ." Attached to Mr. Covington's affidavit, are exhibits "A" through "P" and exhibit "L" (a loan application summary, dated October 6, 1980 regarding the borrower, Jones Motor Company, Inc.), which sets forth the source and program of repayment as follows:

> Primary payable in five (5) five annual installments of $11,252.30. Payments to come from sale of property or note will be completly paid out with long term financing. Secondary-Liquidation of Collateral.

Futher, in the remarks section of that document the following appears:

> As per our phone conversation, we will be looking at some form of long term financing. However, from what little I have seen, it may be very difficult to put together. This will leave them with the requirments of liquidating properties to retire the debts owed by the various corporations, which was the original method of debt retirement. At this point, there is nothing in the way of a sale on the horizon. In the immediate future, they have approximately $75,000.00 coming due (by 12-31-80). (emphasis added)

Exhibit "L" is a FSB generated document and does make reference to "long term financing" and it bears affiant's signature.

The underlined portion of paragraph 49, above, is an apparent attempt to ignore exhibit "L".

Paragraphs 47 and 49 are admissions that long term financing to Jones Motor Company, Inc., (a subsidiary of AW was being considered by officers of FSB during October of 1980, when read carefully and in conjuction with exhibit "L".

The Heaton, Carter, Brown, Robison and Covington affidavits all fail to meet the requirements of rule 56(e) URCP and therefore should be striken from the files.

Through the affidavits and depositions submitted by appellants in oppositions to, motions, for summary judgment, numerous issues of material fact were raised, Specifically see the affidavits of Chas. E. Bryan and the deposition of Norman T. Stephens taken on December 1, 1986.

CONCLUSION

It is apparent from the MEMORANDUM DECISION the Trial Court failed to follow the requirements of rule 56 of the Utah Rules of Civil Procedure when it granted summary judgment. The Court did not consider all the pleadings, depositions, answers to interrogatories, admissions and affidavits in the light most favorable to the parties moved against, if they were, in deed, considered at all.

Also, appellants' pleadings affirmatively alledge defenses and counterclaims that render summary judgment inappropriate. Summary judgment in these cases has the effect of denying properly pled defenses to the appellants.

Furthermore, the depositions, affidavits and other memoranda filed in opposition to the motions by appellants raise fenuine issues of material fact, thereby precluding summary judgment.

It is respectfully submitted that upon a review of the pleadings and documents on file herein, this court will see the manifest error of the Trial Court, reverse and remand to trial.

DATED this 11TH day of April, 1989

Chas. E. Bryan, Pro Se

Norman Stephens, Pro Se

Paul D. Graff, Pro Se

CERTIFICATE OF MAILING

This is to certify that I mailed a true and exact copy of the above and foregoing ORDER, postage prepaid, on this 11th day of April, 1989 to:

James L. Wilde
Kent H. Murdock
92 North University Ave.
Provo, Utah 84601

Thomas M. Higbee
P.O. Box 726
Cedar City, Utah 84720

Chas. E. Bryan